

F/C/373/89

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION
JUDICIAL DISTRICT OF FREDERICTON

BETWEEN:

CLARENCE AGNEW AND OTHERS,

Plaintiffs,

- and -

THE DOW CHEMICAL COMPANY,
DOW CHEMICAL CANADA INC.,
AND ICI CHIPMAN, a business
unit of CIL INC.,

Defendants

A F F I D A V I T

I, Jerry K. White, of the City of Fredericton,
in the County of York and Province of New Brunswick, MAKE
OATH AND SAY AS FOLLOWS:

1. I am one of the plaintiffs in the action having
cause number F/C/373/89 and as such I have personal knowledge
of the facts herein deposed to unless otherwise stated.

2. I have been advised by my solicitor, William
B. Richards of Clark, Drummie & Company, in respect of
the law concerning the disclosure of documents during the
discovery process in an action. I understand that documents
produced for discovery in an action are not to be used
for matters extraneous or ulterior to the prosecution of
the case.

- 2 -

93

3. In regards to the advice I have received from my solicitor and my understanding of such advice as referenced above, I intend to comply with the law; it has never been my intention to do otherwise.

SWORN TO at the City of)
Fredericton, in the County of)
York, in the Province of New)
Brunswick, this 9th day of)
August, A.D., 1991.)

BEFORE ME:

Timothy M. Hopkins
Commissioner of Oaths
Being a Solicitor

Jerry K. White
Jerry K. White

S/C/738/89

Agnew et al.

v. Dow Chemical

Documents received from
Consolidation of Cases
Affidavits of documents +

**ALSO: DOCUMENTS FROM
MOTIONS HEARD
MARCH 16, 1992**

PRESTON

No. 2815-346

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MADE IN CANADA

S/C/738/89

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK
TRIAL DIVISION

JUDICIAL DISTRICT OF SAINT JOHN

BETWEEN:

CLARENCE AGNEW and OTHERS,

-and-

DOW CHEMICAL COMPANY, DOW CHEMICAL
CANADA INC., and CHIPMAN INC., and
UNIROYAL CHEMICAL LTD./UNIROYAL
CHEMICAL LTEE.,

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN
FILED
DEPOSE
APR 1 1992
COUR DU BANC DE LA REINE
Plaintiffs SAINT-JEAN

Defendants

AND BETWEEN:

JEAN VIVIAN AGNEW and OTHERS,

Plaintiffs

-and-

DOW CHEMICAL COMPANY, DOW CHEMICAL
CANADA INC., and CHIPMAN INC., and
UNIROYAL CHEMICAL LTD./UNIROYAL
CHEMICAL LTEE.,

Defendants

Before: The Honourable Mr. Justice Robert Higgins

At: The Provincial Building, Saint John, N.B.

Commencing: Monday, March 16th, 1992 at 1:30 p.m.

Appearances: William Richards, Esq., and George Byrne, Esq.,
appearing for the Plaintiffs

Thomas O'Neil, Esq., appearing for the
Defendants Dow Chemical Company and Dow
Chemical Canada Inc.

Ms. Brenda Lutz appearing for the Defendant
Chipman Inc.

Gary Faloon, Esq., appearing for NB Power

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1 THE COURT: This is in the matter -- there are three
motions here -- Clarence Agnew et al, Dow Chemical
Company, Dow Chemical Canada Inc., Chipman Inc., and
5 UniRoyal Chemical Ltd. and UniRoyal Chemical Ltee.
Appearances, please on behalf of the Plaintiffs,
Clarence Agnew?

MR. RICHARDS: William Richards and George Byrne on behalf
of all Plaintiffs, My Lord, and for all motions.

THE COURT: Thank you. On behalf of Dow Chemical?

10 MR. O'NEIL: Thomas O'Neil, My Lord, on behalf of Dow
Chemical Company and Dow Chemical Canada Inc. in all
actions.

THE COURT: And on behalf of Chipman Inc.?

15 MS. LUTZ: Brenda Lutz appearing on behalf of ICI Chipman
Inc. in all actions.

THE COURT: And on behalf of UniRoyal Chemical Ltee.?

MR. O'NEIL: My Lord, I have a letter from Mr. Norman,
who acts on behalf of UniRoyal, and he has indicated
20 that he will not be appearing on the return of these
motions.

THE COURT: Thank you.

MR. FALON: My Lord, Gary Falon appearing on behalf of
NB Power.

25 THE COURT: All right. Is NB Power taking a position in
this matter?

MR. FALON: No, sir.

30 THE COURT: The first motion that is before me is with
respect to an application for -- a motion, rather, for
an order that SODA Health and Environment and its
executive director, Jerry K. White, as agents of the
Plaintiffs pursuant to a litigation management agreement

1 have in their possession and control documents relating
to matters in issue that have not been disclosed and
they are requesting further and better affidavits.

5 I have a couple of questions right off the bat I
would like to just get. Is SODA a legal entity?

MR. O'NEIL: Perhaps Mr. Richards can respond to that, My
Lord. My understanding is --

THE COURT: I mean is somebody here representing SODA?
Is SODA a legal entity?

10 MR. O'NEIL: No.

THE COURT: SODA is not a legal entity?

MR. RICHARDS: SODA is a registered name and style, My
Lord, and it consists of approximately 100 or 120
members.

15 THE COURT: For these purposes it is not a legal entity
and nobody here is representing SODA?

MR. RICHARDS: No.

THE COURT: No. Okay. And then I take it, it follows that
SODA is not a party to any of these proceedings?

20 MR. RICHARDS: No.

THE COURT: All right.

MR. O'NEIL: My Lord, I believe we have an agreement with
counsel for the Plaintiffs that Jerry White will execute
an affidavit of documents listing all the documents in
25 the possession, power, and control of SODA and he will
list all documents whether they are relevant or not
and set them out in the appropriate schedules, whether
they be documents for disclosure, documents which are
privileged, and documents that he considers are
30 irrelevant and then we will be left, if we so wish, with

1 the right to make a further application to the Court
for production of those documents listed in the affidavit
of documents, and I believe counsel for the Plaintiff is
in agreement with that.

5 MR. RICHARDS: Yes, My Lord. I have an agreement. There
is one, perhaps a technicality. I am not sure I should
put in the affidavit of documents, documents which are
irrelevant. Once you put them in the categories are,
they are either, they are relevant and privileged or
10 they are relevant and not privileged. With Mr. O'Neil's
consent and with the Court's consent -- now, I did
agree to what Mr. O'Neil has just said. I am not
backing away from that. I think it might be more
appropriate if I listed all those documents which were
15 relevant, whether privileged or not. The documents
which I feel are not relevant, give them to him in a
letter and he will have a list in, basically in a
letter from me and it will simply say, these are the
documents which we have which I consider not relevant
20 and they shouldn't be in the affidavit of documents,
but he will get -- it will be the same list that he
would get otherwise.

THE COURT: So, you're willing to make disclosure?

25 MR. RICHARDS: I beg your pardon?

THE COURT: You're willing to make disclosure?

MR. RICHARDS: I am willing to make disclosure.

THE COURT: Okay. Fine. All right, then proceed on the
basis of agreement. All right, that deals then with
30 that matter.

Then there is the next motion about a consolidation.
Is there agreement or disagreement on consolidation?

1 MR. RICHARDS: There is no agreement on consolidation, My
Lord.

THE COURT: All right.

MR. O'NEIL: My Lord, my argument on that is very simple.

5 It is that -- you have the pleadings in all the actions.
The pleadings indicate that all the actions relate to
the same issues. The action in which NB Power is the
Defendant has been somewhat kept in abeyance, although
we are third parties to it. If the action as against
10 NB Power is to proceed we wish that that action be
tried at the same time as it involves the, substantially
the same issues and the same parties and it is our
position that it is appropriate that an order that the
actions be consolidated or tried together issue in this
15 instance.

THE COURT: And these actions, that's S/C/738/89,
S/C/268/90 and F/C/668/89 and by my order I believe
I consolidated the F/C order and directed that it be
tried in Saint John, as I recall.

20 MR. O'NEIL: No, that is not quite right, Your Lordship.

THE COURT: No?

MR. O'NEIL: At one point in time there were four actions.
There was, with the Dow companies as Defendants there
was a Saint John action and a Fredericton action.
25 Those two have been consolidated into one action.

THE COURT: I see.

MR. O'NEIL: There was also a Saint John and Fredericton
action with NB Power as Defendants, so we have
consolidated the four original actions. Two of them
30 have been consolidated in the cause S/C/738/89.

1 THE COURT: Well, list -- list those actions that you wish
consolidated just for the record.

MR. O'NEIL: If I can come at it this way, Your Lordship,
the actions in which the Dow companies are Defendants,
5 which are S/C/738/89 and that is two actions which have
been consolidated into one. Also the two actions in
which the Dow companies are a third party. They are
S/C/268/90 and F/C/668/89.

THE COURT: And you're a third party in both those
10 actions?

MR. O'NEIL: Yes, and in the first action we are a
Defendant.

THE COURT: And why do you wish those all consolidated?

MR. O'NEIL: It is our position, Your Lordship, clearly
15 from the pleadings that they both relate to the same
factual situation. They both, all relate to the same
Plaintiffs and all apparently relate to the same
damages and all actions really -- well, the actions
with NB Power, all of the same parties as the two
20 actions in which -- the Saint John actions in which
Dow, the Dow companies are Defendants. They all,
except the NB Power actions, do not yet have UniRoyal
as a Third Party, but ICI Chipman are also a Third
25 Party in those actions.

THE COURT: What is the position of the Power Commission?

MR. FALON: My Lord, we don't have any positions. We
are not for it or against it at this time.

THE COURT: You have no objection to the consolidation?

MR. FALON: No, sir.
30

THE COURT: Mr. Richards?

MR. RICHARDS: My Lord, there are two points. One is the

1 -- at the present time the Plaintiffs and NB Power are
negotiating, and I think quite close to, an agreement
on discontinuance of the action by the Plaintiffs
against NB Power. I am not going to stand here and
5 undertake to the Court that that is definitely so --

THE COURT: No.

MR. RICHARDS: -- but that is in fact --

THE COURT: If you -- assuming you do not negotiate a
settlement and you decide to proceed, would you have
10 any objection to consolidation?

MR. RICHARDS: No, no.

THE COURT: So, your argument is prematurity?

MR. RICHARDS: Well, I think what I am asking for is
perhaps an adjournment for a few days until we -- and
15 it won't be very long until we finally decide what the
situation is, but I would need that --

THE COURT: Any objection, Mr. O'Neil?

MR. O'NEIL: No, My Lord, but our position is that if the
actions are discontinued I presume that NB Power wishes
20 also to discontinue the action as against the Third
Party and we would wish any discontinuance as against
the Dow companies to be a discontinuance that would
bar further actions. We will not be prepared to
consent nor would we agree to any discontinuance that
25 would allow the actions to be recommenced.

THE COURT: That is not in front of me. All that is in
front of me is a motion for consolidation and Mr.
Richards has indicated that perhaps it is premature.

MR. O'NEIL: Well, I don't think the motion for
30 consolidation is premature. If they are doing something,
Your Lordship, I mean, the action as against NB Power

1 I think has been ongoing since 1989. They have had
ample time to either discontinue or decide what they
are going to do. I think the proper course is to order
5 that the actions be consolidated and then it is up to
Mr. Richards if he does discontinue that he can make
an application to have the discontinuance filed.

THE COURT: You wouldn't give him three days?

MR. O'NEIL: Well, I --

THE COURT: You are a hard man.

10 MR. O'NEIL: Well, if it is only a matter of coming back
here and -- I don't want to have to take the application
out again. If you want to give us a date to come back
and --

15 THE COURT: I will grant you your time. How much time do
you think you require reasonably?

MR. RICHARDS: I would think by week's end it should be --

THE COURT: I will adjourn this particular motion sine
die and to be reactivated on the motion of either party.

20 MR. RICHARDS: Thank you, My Lord.

THE COURT: All right. By the way with respect to the
first motions the costs will be in the cause, and
that brings me to the next motion and that is with
respect to Jean Agnew. Yes. All right. Do you wish
25 to speak to that, Mr. O'Neil?

MR. O'NEIL: Yes, My Lord. My Lord, this is an application
based on two grounds. Firstly, it is an application
based upon the ground that the action was not started
with the authority of the Plaintiff, Jean Vivian Agnew,
30 and I have attached as an exhibit, Exhibit E, to Miss
Wade's affidavit the transcript of the Examination for
Discovery of Jean Vivian Agnew, which occurred on the

1 10th day of February, 1992. That transcript is very
short in duration, but I think it is clear from that
transcript that Mrs. Agnew did not authorize any action
to be started on her behalf. I should point out that
5 a request was made to the Plaintiffs and it is also set
out for confirmation pursuant to Rule 17.02 that the
action was started on their behalf and those are
Exhibits C and D to Miss Wade's affidavit. It was
confirmed that the action was started on instructions
10 from the Plaintiff. It is clear and even in the
affidavit in response by Mrs. Agnew nowhere does she
indicate that she has authorized this action to be
started on her behalf. She talks about her husband
entering into an agreement with one Jerry White to act
15 as his agent to start it, but nowhere does she indicate
that she has given authority either to Plaintiffs'
counsel or to Jerry White to start the action on her
behalf and her affidavit does not respond to that.

20 THE COURT: She says, "I am a Plaintiff in the within
consolidated action."

MR. O'NEIL: She says she is a Plaintiff, My Lord, but
-- and that is in fact true that she is a Plaintiff,
but nowhere does she indicate that she had authorized
the action to have been commenced in her name and, in
25 fact, when questioned on Examination for Discovery, and
she doesn't contradict that in her affidavit, I said:

"Q. Did you instruct anyone to commence
an action on your behalf?

A. No, I did not.

30 Q. I am showing you JVA-1 which is the
Notice of Action and Statement of Claim
in which you are named as Plaintiff. Am
I correct from your evidence that you
did not authorize that you be named as
a Plaintiff in that action?

A. No.

Q. Did you authorize that action to be commenced in your name?

A. No."

Also, My Lord, I think what is more important is the question is really the application for summary judgment pursuant to the provisions of Rule 22 and I think the both of these can be tied together, but clearly from the Examination for Discovery of Mrs. Agnew she has suffered no damages or has indicated on Discovery that she is not aware of any exposure to herbicides of herself other than washing her husband's clothes. We went through and asked her on question 11, and I'm showing you 1 for Identification:

"Q.11 And am I correct that you did not suffer any damages as a result of exposure to the herbicides?

A. That's correct.

Q.12 I'm showing you a medical report.

A. Yes.

Q.13 And he's been your family doctor."

It is our position that this Plaintiff has not had any exposure to herbicides, nor has she given us any evidence that she has suffered any damages. The medical reports are set out as a result of herbicide exposure.

It is our position that a summary judgment is proper pursuant to Rule 22 and I think it is very similar to the decision in Guardian Insurance and McCulloch, which was a decision of Judge Miller, which 87 N.B.R. 2d 210. And I would like to just quote from two passages from there. At page 217 Mr. Justice Miller indicated:

"In my opinion summary judgment is a remedy which should not be granted unless the grounds for it are very clear. It is not

1 an order which should be considered on
a balance of convenience or probabilities.
On the other hand, I think it reasonable
for a Court to protect a party from the
necessity of proceeding to litigation
when the result is obvious to the Court."

5 And further at page 235 and onto page 236 Mr. Justice
Miller indicated:

10 "A summary judgment should be granted only
with extreme caution because every party
should be afforded his day in court and a
hearing on the merits of the action. It
would have to be a particularly unusual
circumstance in which a Defendant would be
granted a summary judgment on the basis
that the Plaintiff's claim is without
merit."

15 But in that case Mr. Justice Miller went on to grant
summary judgment, that being an action against a lawyer
for negligence and it is my position that in the within
claim that there is absolutely no evidence to point to
the Dow companies in this evidence or there is no
evidence that the Plaintiff has suffered any damages
and that those damages relate to the herbicide
exposure.

20 I think it is important to recognize what Mr.
Justice Miller said, that it is reasonable for the
Court to protect the party of the necessity of proceeding
to litigation when the result is obvious to the Court.
Your Lordship, it is my submission that there is
25 nothing in response to the motion that indicates that
there is any merit or any balance to the Plaintiffs'
claim.

30 I would say this to the Court, that if the
Plaintiffs have any medical evidence, any scientific
evidence that in any way would show that the Plaintiffs'
alleged injuries are in any way related to herbicide

1 exposure, I have no problem giving leave to them to
filing anything with the Court that would indicate in
any way that Mrs. Agnew's supposed complaints, if she
has any, are in any way related or caused by herbicide
5 exposure, but based upon her evidence on Examination
for Discovery and what has been produced there is --
firstly, there is nothing to show any causal connection
and, secondly, and more importantly, there is nothing
to show any damages. And I have no objection, as I
10 said, Your Lordship, again here if the Plaintiffs want
time to file some evidence that they may have to show
that there is a connection and it may seem somewhat
harsh on Mrs. Agnew that we make this application on
her behalf, but I can and I think I should advise the
15 Court that there are other Plaintiffs here that we
intend to make similar applications and I think it is
important that the Plaintiffs be able to show us
at least there is some merit or some basis to the claim.

20 THE COURT: Well, doesn't Mrs. Agnew in her affidavit
indicate that any questions concerning her health or
the impact that herbicides may have had would be the
subject of expert testimony? Isn't that what she is
saying? She say she has sore eyes. She said she had
25 cancer in 1971, but otherwise her overall health is
pretty good.

MR. O'NEIL: Right, but my point is, Your Lordship,
nowhere does she say that that was ever caused or
nowhere does anyone ever say --

30 THE COURT: In her Statement of Claim doesn't she allege
that damages were caused? Isn't this an evidentiary
question?

1 MR. O'NEIL: But based upon her evidence at Examination
for Discovery --

5 THE COURT: Well, go ahead. Show me. She said did you
suffer -- I read her affidavit. I read the Discovery
and on first blush when I read the Discovery I thought
well, maybe there is some validity in what your motion
is, but when I read her affidavit she says that, with
respect to whether or not she authorized herself to
become a Plaintiff, she starts off by saying, "I am
10 a Plaintiff". And then she says she was a Plaintiff
in the Dow Chemical matter in the United States and
that it was her understanding that Jerry White was
going to be the agent and act on her behalf. Isn't
that by necessary implication that she is a Plaintiff
15 and she authorized Mr. Richards to act on her behalf
and continues to do so?

MR. O'NEIL: Well, My Lord, to me that is stretching that
a fair bit to say that.

20 THE COURT: Well, it is either that or deprive a person of
a day in court. I mean, if there is going to be an
interpretation put on words it is not going to be to
deprive a person a day in court unless it is very
clear to quote your case.

25 MR. O'NEIL: I hear you on that, Your Lordship.

30 THE COURT: With respect to the second part of it the
woman says, "I did point out in my Examination for
Discovery that I did have cancer in 1971 and was in
Saint John for that purpose for approximately that
one month. That answer is set out in question 14.
It is my intention to continue with my claim." And
she said -- whether or not the cancer that she suffered

1 or whether or not her sore eyes, those are the only
two things that are in her affidavit, resulted from
chemical spraying or the washing of her husband's
clothes, that type of thing, that is evidentiary I
5 would think and then she can't, she can say no more
than that she believes it by bringing her Statement of
Claim and leaves it to medical evidence.

MR. O'NEIL: But I think that we are entitled as a result
of the Discovery to some medical evidence or some
10 reports to be put forward on her behalf that there is
some type of connection. She has no medical reports.
The only medical report that she had is that of the --

THE COURT: No, but if a person says my overall health is
pretty good, except that I had cancer, you know, I mean
15 some people that is the way they talk. Other people
would collapse. And would you say well, therefore --
you sound like you are in pretty good health and
therefore unless you can supply some medical evidence
before we get to trial you are out of court?

20 MR. O'NEIL: No, but I think -- I think there is an
obligation on the Plaintiff. Lots of people have
cancer and that doesn't mean that everyone that has
cancer, that it was caused by herbicide spraying. I
think that she should have to produce some evidence
25 to show that her injuries were caused or contributed
to by the exposure to the herbicides, and if you take
a look at the report --

THE COURT: The doctor's report, Doctor Donald?

30 MR. O'NEIL: Yes. That there is no question and as he
said --

THE COURT: Just read what he says.

1 MR. O'NEIL: "Her major concerns are the varicose veins..."

THE COURT: Her major concerns. Her overall health has been good.

5 MR. O'NEIL: Mmm-hm. "In 1971 she had cobalt radiation for treatment of cancer of the cervix." My point is, Your Lordship, nowhere does it say that any of these health injuries were either caused or contributed to by exposure to herbicides.

10 THE COURT: Well, what does her Statement of Claim say? "The Plaintiffs claim general damages for personal injury caused by the herbicides." That is what she is alleging. And then it is a question of whether or not she has an evidentiary basis to support that claim. When she is in front of an Examination for Discovery 15 she says, "My health overall is very good. My eyes are sore like they are today and I have cancer."

MR. O'NEIL: And it is our position that we should be entitled to that evidence that would draw the connection between her injuries and the exposure to 20 the herbicides, and --

THE COURT: Well, you might be able to make an application for that, but the application in front of me is to strike her claim and your hurdle is to convince me that it is clear before I would order her out of 25 court. Is it clear? That is rhetorically. I am not asking you to respond to it.

MR. O'NEIL: To me it is clear, Your Lordship.

THE COURT: Yes. Anything further?

30 MR. O'NEIL: No.

THE COURT: I won't require to hear from you, Mr. Richards, on that motion. The motion is dismissed. It is not

clear, at least to me, and there will be costs of
\$500.00 payable by Dow in any event.

Anything further? Thank you.

(End of proceedings.)

Certified to be a true transcript
of my shorthand notes of these
proceedings, to the best of my
ability.

Robin Cogswell
Robin Cogswell, Court Reporter.

BARRY & O'NEIL
Barristers and Solicitors
P.O. Box 6010, Station "A"
Saint John, New Brunswick
E2L 4R5
(506) 633-4226

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M E M O R A N D U M

TO: Clerk of the Court
110 Charlotte Street
Saint John, New Brunswick

FROM: Deirdre L. Wade

CAUSE: S/C/738/89 - Agnew et al. v. Dow Chemical et al.
S/C/268/90 - Agnew et al. v. NBEPC et al.
F/C/668/89 - Agnew et al. v. NBEPC et al.

DATE: March 13, 1992

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Please find enclosed Records on Motion with respect to the above noted matters. Kindly acknowledge receipt, returning a stamped copy of this correspondence to the undersigned in the enclosed envelope. Thank you.

Deirdre L. Wade

Deirdre L. Wade

DLW/ejdp
Enclosures

COURT OF QUEEN'S BENCH
CLERK / SAINT JOHN

FILED
DEPOSE

MAR 13 1992

REC'D
RECU

COUR DU BANC DE LA REINE
GREFFIER / SAINT-JEAN

GILBERT, McGLOAN, GILLIS
BARRISTERS & SOLICITORS

DONALD M. GILLIS, QC.
A. G. WARWICK GILBERT, QC.
DOUGLAS A. M. EVANS, QC.
C. DWIGHT ALLABY
DAVID N. ROGERS
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BRENDA J. LUTZ

MARY ANN G. HOLLAND
PAULETTE C. GARNETT
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March 16, 1992
COURT OF QUEEN'S BENCH
SAINT JOHN

Mr. Justice John Turnbull
Court of Queen's Bench of NB
Provincial Building
110 Charlotte Street
Saint John, NB

My Lord:

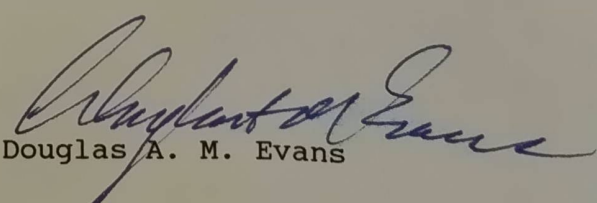
RE: Agnew v. Dow Chemical et al, S/C/738/89

Enclosed please find the Affidavit of Douglas A. M. Evans in support of the motion being brought by Dow Chemical to be heard today.

We apologize for the lateness in filing this affidavit.

Yours very truly,

GILBERT, MCGLOAN, GILLIS


Douglas A. M. Evans

DAME/ads
Enclosure